

Under the General Data Protection Regulation ('GDPR') and the Data Protection Act 2018, ('the Act') the Government is required to consult with the Data Protection Commission ('DPC') during the preparation of a legislative measure that relates to processing. This guidance document sets out the legislative consultation process. It also includes, at Annex A, a consultation form that should be completed and submitted with the proposed legislative measure.

## Scope of the consultation requirement under the GDPR and the Data Protection Act 2018

Article 36(4) GDPR sets down the requirement that *"Member States shall consult the supervisory authority during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing."*

The Act gives further effect to the GDPR and also transposes the Law Enforcement Directive ('LED'). Section 84(12) of the Act, which relates to the LED, also provides that a Minister is required to consult with the DPC during the preparation of any legislative measure that relates to the processing of personal data.

This means that State bodies developing legislative proposals have a statutory obligation to consult with the DPC when the legislation in question foresees or requires the processing of personal data under the GDPR or the LED. This includes both primary legislation (Bills) as well as secondary legislation, including statutory instruments (SIs) and regulations as well as legislation implementing a European measure.

## What is meant by processing personal data

Personal data essentially means any information about a living person, where that person either is identified or could be identified through direct or indirect means. Personal data can include types of information such as names, dates of birth, identification numbers, email address, phone numbers, addresses, physical characteristics or location data – once it is clear to whom that information relates, or it is possible to find out.<sup>1</sup> Processing essentially means using personal data in any way, including collecting, storing, retrieving, consulting, disclosing or sharing with someone

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<sup>1</sup> See Article 4(1) GDPR for the full definition of 'personal data'.

else, erasing, or destroying personal data.<sup>2</sup> It includes processing by automatic or non-automatic (manual) means.

## Types of processing that requires consultation with the DPC

Any legislative proposal that affects the processing of personal data will require consultation with the DPC. Examples of processing activities include:

- ☑ Mandating the collection of personal data,
- ☑ Requiring the transfer of personal data between State Agencies,
- ☑ Restricting data subjects' rights.

The Act also sets down specific instances where the Minister for Justice is required to consult with the DPC before making regulations. These include:

- ☑ **Regulations giving full effect to Chapter IV (Mutual Assistance) of the Council of Europe's 1981 Data Protection Convention:** Section 12 of Act,
- ☑ **Regulations on the designation of a data protection officer:** Section 34(1) of the Act,
- ☑ **Regulations limiting personal data transfers outside the EU:** section 37(1) of the Act,
- ☑ **Regulations on the Common Travel Area:** Section 38(3) of the Act.

The Act also requires the Minister for Justice or any other Minister to consult with the DPC before making the following regulations:

- ☑ **Regulations on the processing of personal data necessary for the performance of a task carried out in the public interest or for the exercise of official authority:** Section 38(5) of the Act requires a Minister to consult with the DPC before making regulations with respect to the processing of personal data that is necessary and proportionate for the performance of a task carried out in the public interest by a controller or for the exercise of official authority vested in a controller.
- ☑ **Regulations on special category data and personal data relating to criminal convictions and offences:** Section 51(6) of the Act requires a Minister to consult with the DPC before making regulations that authorise the processing of special category data and/or personal data relating to criminal convictions and offences for reasons of substantial public interest.
- ☑ **Regulations on personal data relating to criminal convictions and offences:** Section 55(5) of the Act requires that a Minister consult with the DPC before making regulations on personal data relating to criminal convictions and offences, where the processing is necessary and proportionate to:

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<sup>2</sup> See Article 4(1)(2) GDPR for the full definition of 'processing'.

- (a) assess the risk of fraud or prevent fraud, or
  - (b) assess the risk of bribery or corruption or both or to prevent bribery or corruption or both, or
  - (c) ensure network and information systems security, and prevent attacks on and damage to computer and electronic communications systems.
- ☑ **Regulations restricting the rights of data subjects:** Section 60(10) of the Act requires that a Minister consult with the DPC before making regulations considered necessary for the protection of a data subject or the rights and freedoms of others restricting the rights and obligations set down in Articles 5, 12 to 22, or 34 of the GDPR. Such regulations can apply in the following instances:
- (a) if the application of those rights and obligations would likely cause serious harm to the physical or mental health of the data subject, and to the extent to which, and for as long as, such application would be likely to cause such serious harm, and
  - (b) in relation to personal data kept for, or obtained in the course of, the carrying out of social work by a public authority, public body, a voluntary organisation or other body.
  - (c) where such restrictions are necessary for the purposes of safeguarding important objectives of general public interest.
- ☑ **Regulations on suitable and specific measures for processing:** Section 36(6) of the Act requires that a Minister consult with the DPC before making regulations:
- (a) where there is a requirement to take suitable and specific measures to safeguard the fundamental rights and freedoms of data subjects in the processing of their personal data, and the regulation identifies additional suitable and specific measures other than the ones set out in section 36(1),
  - (b) to make it mandatory to adopt those specific suitable and specific measure(s).
- ☑ **Regulations on the processing of special categories of personal data under the Law Enforcement Directive:** Section 73(2) of the Act requires that a Minister consult with the DPC before making regulations permitting the processing of special categories of personal data where the processing is necessary for reasons of substantial public interest.
- ☑ **Regulations on the restrictions of data subject rights under the Law Enforcement Directive:** Section 94(9) of the Act requires that a Minister consult with the DPC before making regulations restricting certain data subject rights.

## Data Protection Impact Assessments

During the preparation of a legislative measure, a Data Protection Impact Assessment ('DPIA') may be required, or may be helpful to identify risks to the rights and freedoms of individuals.<sup>3</sup> In light of Article 35(10) GDPR, it is also recommended that a DPIA is carried out during the legislative drafting process as a means not only to help ensure the legislative measure meets data protection requirements, but also to identify and mitigate risks with respect to its inconsistent application by data controllers subject to the legislation. Controllers are required to undertake a DPIA for any processing or intended processing that is 'likely to result in a high risk to individuals'.<sup>4</sup>

Controllers are also required pursuant to Article 36(1) GDPR and section 84(1) of the Act (which relates to LED) to consult with the DPC prior to processing where a DPIA indicates that the processing would result in a high risk to the rights of freedoms of individuals in the absence of measures taken by the controller to mitigate the risk. For more information on DPIAs, see the DPC's [Guide to Data Protection Impact Assessments](#).

## Consultation requirements with the DPC

In order to effectively meet the requirements of Article 36(4) GDPR and section 84(12) of the Act, the DPC should be consulted on legislation during the development phase.<sup>5</sup> This will allow the DPC to properly assess the proposed legislative measure and facilitate consideration of any comments the DPC may have prior to its finalisation. It is important that sufficient time is given to the DPC to consider any legislative proposal. State bodies should also consult their own Data Protection Officers on the legislative proposal prior to it being submitted to the DPC.

Recital 96 GDPR states that the legislative consultation should take place with the supervisory authority, *"in order to ensure compliance of the intended processing with this Regulation and in particular to mitigate the risk involved for the data subject"*. The DPC considers that the consultation requirement is an on-going one, and that State bodies

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<sup>3</sup> Recital 93 GDPR states *"In the context of the adoption of the Member State law on which the performance of the tasks of the public authority or public body is based and which regulates the specific processing operation or set of operations in question, Member States may deem it necessary to carry out such assessment prior to the processing activities."*

<sup>4</sup> Article 35(1) GDPR.

<sup>5</sup> While it is not possible to point to a precise moment in time as to when the DPC should be consulted, a good rule of thumb is to consult the DPC when there is a well-developed Heads of Bill for primary legislation and when there is a preliminary draft of a Statutory Instrument for secondary legislation.

should keep the DPC informed, particularly when there are significant policy changes to the processing provisions after the initial consultation with the DPC.

Prior to the submission of a legislative measure to the DPC, State bodies should assess the measure in light of the requirements of data protection law. As part of this assessment it is important to note that the right to data protection, which is enshrined in Article 8 of the EU Charter of fundamental Rights ('the Charter'), is not absolute, but any limitation on the right must comply with the requirements laid down in Article 52(1) of the Charter.<sup>6</sup> This provides that any limitation must be provided for by law, respect the essence of the right, meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others and that the limitation is necessary and proportionate. When examining a legislative measure, the DPC will pay particular attention to the necessity and proportionality of a measure when providing its assessment as to whether the proposed measure complies with data protection law.<sup>7</sup>

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<sup>6</sup> Article 51(1) of the Charter provides that the Charter applies to the institutions and bodies of the Union and to Member States only when they are 'implementing EU law'. The CJEU has equated "implementing EU law" to "falling within the scope of EU law". CJEU, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26 February 2013 and CJEU, case C-300/11 (Grand Chamber), *ZZ v. Secretary of State for the Home Department*, 4 June 2013, para 51.

<sup>7</sup> For more information see the European Data Protection Supervisors toolkits "Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A Toolkit" available here [https://edps.europa.eu/sites/default/files/publication/17-06-01\\_necessity\\_toolkit\\_final\\_en.pdf](https://edps.europa.eu/sites/default/files/publication/17-06-01_necessity_toolkit_final_en.pdf) and "Assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data available here [https://edps.europa.eu/sites/default/files/publication/19-12-19\\_edps\\_proportionality\\_guidelines2\\_en.pdf](https://edps.europa.eu/sites/default/files/publication/19-12-19_edps_proportionality_guidelines2_en.pdf)

## Annex A

### Legislative consultation form

This form should be completed and accompany the legislative measure on which the DPC is being consulted pursuant to Article 36(4) GDPR or section 84(12) of the Act, or pursuant to one of the specific provisions in the Act that requires consultation with the DPC before making the regulation in question.

It should be reviewed by your Data Protection Officer prior to it being submitted to the DPC.

The form can be sent to [consultation@dataprotection.ie](mailto:consultation@dataprotection.ie) or to your focal point person on the supervisory team.

<b>Your Department</b>	
<b>Title of legislative measure</b>	
<b>Type of legislative measure: Primary or Secondary legislation and type of secondary legislation. Please also include the name of primary legislation under which the measure is to be made (if applicable). If the measure is intended to give effect to a piece of European legislation, please also cite here.</b>	
<b>The provision in the GDPR or in the Act under which you are consulting the DPC.</b>	
<b>Drafting timeline of legislation and its current stage.</b>	
<b>Name and contact details for liaison person.</b>	
<b>Name and contact details for Data Protection Officer (if different from above).</b>	
<b>Have you consulted with your Data Protection Officer?</b>	
<b>Questions on the legislative measure</b>	

<b>Provide a summary of the proposed legislative measure. This should include an explanation of the issue that the legislation seeks to address.</b>	
<b>Please cite the provisions that relate to personal data processing.</b>	
<b>Please provide details of the types of personal data that will be processed under the legislative measure.</b>	
<b>Does the legislative measure propose the processing of special categories of personal data or Article 10 GDPR personal data? If so, please explain.</b>	
<b>Which group(s) of data subjects will the legislative measure affect? Please also include any vulnerable groups such as children.</b>	
<b>If the legislative measure relates to the collection of personal data, state where the personal data will be collected from.</b>	
<b>Does the legislative measure propose the sharing of personal data between data controllers? If so, please explain.</b>	
<b>Does the legislative measure propose to restrict the right(s) of data subjects and obligations of a controller? Please provide details.</b>	
<b>Have any of the processing activities been identified as high risk? If so, please explain.</b>	
<b>Does the processing involve the systematic monitoring of individuals, involve large</b>	

<b>scale processing of sensitive personal data or Article 10 data? Please explain.</b>	
<b>Are there any current issues of public concern that should be considered?</b>	
<b>Is a Data Protection Impact Assessment being conducted with respect to the legislative measure? If not, please explain.</b>	
<b>Has there been a public consultation with relevant stakeholders? If so, please provide details.</b>	
<b>Any other information you wish to bring to the attention of the DPC.</b>	